Dato' Mohd Anuar bin Embong & Anor v Bank Bumiputra Malaysia Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO T-02-126 OF 1994

DENIS ONG, MOHD NOOR AHMAD AND ALAUDDIN JJCA

26 FEBRUARY 2003

Contract *— Damages — Breach — Loss of profit — Respondent breached agreement to discharge charges — Appellants unable to raise financing due to respondent's failure to discharge the charges — Whether claim for the loss of profit too remote — Contracts Act 1950 s 74(1)*

Contract *— Damages — Measure of damages — Respondent breached agreement to discharge charges — Appellants unable to raise financing due to respondent's failure to discharge the charges — Whether there was evidence to support claim for loss of profit*

Contract *— Damages — Mitigation — Respondent breached agreement to discharge charges — Appellants unable to raise financing due to respondent's failure to discharge the charges — Appellants did not make any attempt to raise funds from other sources — Whether appellants had failed to mitigate their losses after breach had occurred*

The respondent initially granted to the appellants an overdraft facility of RM1.5m, for the construction of houses and shops on a piece of land held under a master title. The master title was charged to the respondent as security. The appellants then applied for an increase of the overdraft facility. A feasibility study report stating that the projected net profit from the project was RM3,401,820 was given to the respondent by the appellants. The respondent then granted additional overdraft facility to the appellants and the initial overdraft facility was superseded by an overdraft facility of RM2.5m for the same purpose. The master title was subsequently subdivided into 66 titles. On 23 June 1987, the respondent agreed to discharge the charges on six of these titles to enable the appellants to raise part of the bridging finance. However, the charges were only discharged in March 1992. As a result of the respondent's breach of the agreement to discharge the charges, the appellants did not complete Phase 3 of the project because they were not able to raise part of the bridging finance required. The High Court held the respondent liable to the appellants for breach of contract. The learned senior assistant registrar ('SAR'), in the assessment of damages awarded, inter alia, a sum of RM3,401,820 as loss of profit. On appeal, the learned High Court judge set aside the order of the SAR and entered judgment against the respondent in the sum of RM5,000 as nominal damages. The learned judge held that the loss of profit as claimed did not fall under the first limb of s 74(1) of the Contracts Act 1950. He also held that the loss of profit did not come under the second limb of the section because he found no evidence that the loss was contemplated by the parties. This was the appellants' appeal in respect of the claim for loss of profits.

Held, allowing the appeal:

(1) The claim for loss of profit fell under the first and second limbs of s 74(1) of the Contracts Act 1950 ('the Act'). The respondent knew the purpose of the overdraft facility and the projected net profit to be made by the appellants from the project as reflected in the feasibility study report. The respondent must have accepted the feasibility study report as reliable otherwise it would not have approved the substituted overdraft facility. Further, the respondent knew that the purpose for the discharge of the six charges was to enable the appellants to raise extra financing. Phase 3 could not be implemented because the appellants were not able to raise the extra financing due to the respondent's failure to honour its obligation. Consequently, the loss of profit naturally arose from the breach and the respondent knew, when it agreed to discharge the charges, that loss of profit would be likely to result from the breach. Therefore, the claim for the loss of profit was not too remote (see pp 42E, G–43B).

(2) With regard to the measure of damages, there was ample evidence to support the figure of RM3,402,820 for loss of profit. The evidence adduced by the appellants in regard to the selling price of each type of building to be constructed and the estimated construction costs was not challenged by the respondent. Further, the respondent's counsel agreed as to the correctness of the particulars in the statement of proof of loss of profits prepared by the appellants' solicitors vis-à-vis the evidence. In addition, the projected net profit from the project was stated in the feasibility study report as RM3,401,820. Therefore, the court was satisfied that, on the balance of probabilities, the loss of profit was RM3,401,820 (see p 43B–G).

(3) The appellants, however, had failed to mitigate their losses after the breach had occurred on 20 June 1987. The date of the breach was 20 June 1987 because in the appellants' letter dated 11 June 1987, the appellants had given the respondent eight days' notice to comply with their demand to release the charges. The appellants did not make any attempt to raise the required funds from other sources despite the fact that the property was valued at RM4m and the appellants' witness, PW8, had custody of the six land titles and was in physical possession of those lots. During the period of about nine years between the date of the breach and the actual discharge of the charges, PW8 could have instructed his solicitors to initiate the discharge of the charges as the titles were in his custody but he did not do so and this had rendered Phase 3 a non-starter. By reason of the failure to mitigate their losses, the appellants were only entitled to 50% of the loss of profit as claimed (see pp 43G–44B).

A [**Bahasa Malaysia summary**

Responden pada mulanya telah memberikan kepada perayu-perayu satu kemudahan overdraf berjumlah RM1.5j, untuk pembinaan rumah dan kedai atas tanah yang dinyatakan dalam hakmilik utama sebagai Lot 1233, EMR 892, Mukim Batu Burok, Kuala Terengganu. Hakmilik utama tersebut telah dicagarkan kepada responden sebagai jaminan. Perayu-perayu kemudian telah memohon kemudahan overdraf ditingkatkan. Satu salinan laporan kajian kebolehlaksanaan menyatakan bahawa jumlah keuntungan bersih dari projek tersebut adalah RM3,401,820 telah diberikan kepada responden oleh perayu-perayu. Responden kemudian telah memberikan kemudahan overdraf tambahan kepada perayu-perayu dan kemudahan overdraf yang mula-mula sekali telah digantikan dengan satu kemudahan overdraf berjumlah RM2.5j bagi tujuan yang sama. Hakmilik utama tersebut kemudiannya telah dibahagikan kepada 66 hakmilik. Pada 23 Jun 1987, responden telah bersetuju untuk melepaskan gadaian atas enam daripada hakmilik-hakmilik tersebut bagi membolehkan perayu-perayu memperoleh sebahagian dari kewangan bersepadu. Namun begitu, gadaian-gadaian tersebut hanya dilepaskan pada bulan Mac 1992. Akibat daripada perlanggaran perjanjian responden untuk melepaskan gadaian-gadaian tersebut, perayu-perayu tidak menyelesaikan Fasa 3 projek tersebut kerana mereka tidak dapat memperoleh sebahagian dari kewangan bersepadu yang dikehendaki. Mahkamah Tinggi memutuskan bahawa responden bertanggungan terhadap perayu-perayu kerana melanggar kontrak. Penolong kanan pendaftar ('PKP'), dalam penilaian ganti rugi menurut perintah Mahkamah Tinggi, telah mengawardkan, antara lain, sejumlah RM3,401,820 sebagai kerugian keuntungan. Semasa rayuan, hakim Mahkamah Tinggi telah mengenepikan perintah PKP tersebut dan sebagai ganti, telah memasukkan penghakiman terhadap responden, antara lain, bagi jumlah RM5,000 sebagai ganti rugi nominal. Ini adalah rayuan perayu-perayu berhubung tuntutan untuk kerugian keuntungan.

Diputuskan, membenarkan rayuan tersebut:

(1) Tuntutan untuk kerugian keuntungan terkandung dalam cabang pertama dan kedua kepada s 74(1) Akta Kontrak 1950 ('Akta tersebut'). Responden mengetahui tujuan kemudahan overdraf tersebut dan jumlah keuntungan bersih yang dibuat oleh perayu-peryau dari projek tersebut sebagaimana yang digambarkan dalam laporan kajian kebolehlaksanaan. Responden pasti telah menerima laporan kajian kebolehlaksanaan tersebut sebagai suatu yang boleh dipercayai jika tidak sudah tentu ia tidak akan meluluskan kemudahan overdraf yang diganti kepada RM2.5j tersebut. Tambahan pula, responden telah mengetahui bahawa tujuan pelepasan enam gadaian tersebut adalah bagi membolehkan perayu-perayu mendapatkan wang lebih. Fasa 3 tidak dapat dimulakan kerana perayu-perayu tidak dapat perolehan wang yang lebih oleh sebab kegagalan responden

menepati obligasinya. Oleh itu, kerugian keuntungan sememangnya akan timbul daripada perlanggaran tersebut dan responden mengetahui, apabila ia bersetuju untuk melepaskan gadaian-gadaian tersebut bahawa kerugian akan berlaku keuntungan akibat daripada perlanggaran tersebut. Oleh itu, tuntutan untuk kerugian keuntungan boleh diduga (lihat ms 42E, G–43B).

(2) Berhubung ukuran ganti rugi, terdapat keterangan yang mencukupi untuk menyokong jumlah RM3,402,820 untuk kerugian keuntungan. Keterangan yang dikemukakan oleh perayu-perayu berhubung harga jualan untuk setiap jenis bangunan yang akan dibina dan anggaran kos pembinaan tidak dicabar oleh responden. Tambahan pula, peguam responden bersetuju dengan kesahihan butir-butir dalam penyataan bukti kerugian keuntungan yang telah disediakan oleh peguamcara perayu-perayu vis-à-vis keterangan tersebut. Tambahan lagi, jumlah keuntungan bersih dari projek telah dinyatakan dalan laporan kajian kebolehlaksanaan sebagai RM3,401,820. Oleh itu, mahkamah berpuas hati bahawa, atas imbangan kebarangkalian, kerugian keuntungan berjumlah RM3,401,820 (lihat ms 43B–G).

(3) Namun begitu, perayu-perayu telah gagal untuk memohon peringanan terhadap kerugian mereka selepas perayu-perayu gagal untuk memohon peringanan terhadap kerugian mereka selepas perlanggaran berlaku pada 20 Jun 1987. Tarikh perlanggaran adalah pada 20 Jun 1987 kerana dalam surat perayu-perayu bertarikh 11 Jun 1987, perayu-perayu telah memberikan responden notis lapan hati untuk mematuhi tuntutan mereka untuk melepaskan gadaian-gadaian tersebut. Perayu-perayu tidak membuat apa-apa percubaan untuk memperoleh wang dari sumber lain walaupun pada hakikatnya hartanah tersebut bernilai RM4j dan saksi perayu-perayu, PW8, memegang enam hakmilik tanah dan mempunyai milikan fisikal ke atas lot-lot tersebut. Sepanjang tempoh sembilan tahun antara tarikh perlanggaran tersebut dan pelepasan sebenar gadaian-gadaian tersebut, PW8 boleh mengarah peguamcara-peguamcaranya untuk membuat pelepasan gadaian-gadaian tersebut kerana hakmilik-hakmilik tersebut berada dalam pegangan beliau tetapi beliau tidak berbuat demikian dan ini menyebabkan Fasa 3 tidak dimulakan. Oleh sebab kegagalan untuk meringankan kerugian mereka, perayu-perayu hanya berhak kepada 50% daripada kerugian keuntungan sepertimana yang dituntut (lihat ms 43G–44B).]

Notes

For cases on breach of contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2445–2455.

For cases on measure of damages, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2510–2519.

For cases on mitigation, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2535–2536.

Legislation referred to

Contracts Act 1950 s 74(1)
Evidence Act 1950 ss 65(1)(a)(i), 66

Appeal from: Originating Summons No 24–132 of 1989 (High Court, Kuala Terengganu)

Cecil Abraham (*B Thangaraj*, *Hj Mokhtar Ngah* and *Riswant Singh* with him) (Thangaraj & Assoc) for the appellants.

Tommy Thomas (*Peter Pereira* with him) (*Skrine & Co*) for the respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court): On 28 June 1979, the respondent granted the appellants an overdraft facility of RM1.5m out of which the sum of RM830,000 was bridging finance for the construction of 66 units of houses and shops on land described in the master title as Lot 1233, EMR 892, Mukim of Batu Burok, Kuala Terengganu ('the said land') (see exh P7). The master title was charged to the respondent as security. On 2 January 1983, the appellants by letter applied for an increase of the facility intimating therein that the projected nett profit from the project was RM3,401,820 and enclosing thereto a detailed feasibility study report ('the FSR') (exh P8). On 28 March 1983, the overdraft facility was superseded by another overdraft facility of RM2.5m for the same purpose (exh P9). Subsequently, the land was sub-divided into 66 titles. Going by the pleadings, on 23 June 1987, the respondent agreed to discharge the charges on six titles (exh PI3) to enable the appellants to raise part of the bridging finance. Originally, there were 11 titles involved, out of which, five titles were to be surrendered to the relevant authorities. However, they were discharged only in March 1992. Phases 1 and 2 of the project were completed but Phase 3 was not completed because the appellants were unable to raise part of the bridging finance required as the result of the respondent's breach of the agreement to discharge the charges.

The liability for breach of contract on the part of the respondent had been declared by the High Court and is not an issue before us.

The learned senior assistant registrar ('SAR'), in the assessment of damages pursuant to the order of the High Court dated 10 August 1991, awarded the following sums in favour of the appellants:

Loss of profit	RM3,401,820
Damages for shame (30% of RM3,401,820)	RM1,020,546
Total	RM4,422,366

and interest at 8%pa from 28 March 1986 until realization.

On appeal, the learned judge set aside the order of the SAR and as a substitute, entered judgment against the respondent in the sum of RM5,000 as nominal damages with interest at 8%pa from the date of the judgment to the date of realization and ordered each party to bear their own cost in the High Court and before the SAR. The learned judge held that the loss of profit as claimed did not fall under the first limb of s 74(1) of the Contracts Act 1950 ('the Act'). He concluded that the appellants could not and did not suffer any damage arising naturally from the breach of contract committed by the respondent because the open market value for the 11 lots since the date of the breach until the date of the actual discharge of the charges (20 June 1987 to March 1992) had increased in value by about RM100,000. He also held that the loss of profit did not come under the second limb of the section because he found no evidence to substantiate that the loss of profit on account of the charges in respect of the 11 lots not being discharged was within the contemplation of the parties at the time when the respondent agreed to discharge the charges. And therefore, he disallowed the claim for loss of profit as being too remote. With regard to the measure of damages, the learned judge was not satisfied that the proof on the measure of damages had been established on the balance of four probabilities because the figure of RM3.4m cited in exh P8 as the projected nett profit was merely a bare statement of fact. There was nothing in exh P8 or in the oral evidence of PW8 to show how the sum of RM3.4m was arrived at and that PW8's evidence was too general and vague to assist the court in determining whether or not the projected profit was reasonable.

Before us, only the claim for loss of profit was canvassed. Hence, we need not consider the merits on the claims under other heads. We reviewed the findings of primary facts by the learned SAR and we are of the view that the claim for loss of profit falls both under the first and second limbs of s 74(1) of the Act. The section reads:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Having scrutinized the series of transactions and correspondence between the parties as a whole, we are satisfied that the respondent knew the purpose of the overdraft facility and the projected nett profit to be made by the appellants from the project as reflected in the FSR submitted. The reliability of the contents of the FSR must have been accepted by the respondent otherwise the substituted overdraft facility of RM2.5m would not have been approved. And further, after having been informed by PW8 that he needed only RM1m as bridging finance to proceed with Phase 3 of the project surely the respondent knew that the appellants required the charges on the six titles to be discharged for the purpose of raising the extra RM400,000 through sales of the lots to other parties. In short, the

respondent knew the real purpose for the six charges to be discharged. As Phase 3 could not get off the ground because the appellants could not raise the RM400,000 as the result of the failure on the part of the respondent to honour its obligation, to our mind, the loss of profit naturally arose from the breach and that the parties, especially the respondent, knew when it agreed to discharge the charges that loss of profit would be likely to result from the breach. Therefore, the claim for the loss of profit was not too remote.

With regard to the measure of damages there are ample evidence to support the figure of RM3,401,820 for loss of profit. Firstly, though the original FSR was not tendered at the hearing, the appellants were justified in adducing secondary evidence of it under s 65(1)(a)(i) of the Evidence Act 1950 since it was lost from their possession and an original copy of the FSR appeared to be in the possession of the respondent and that the required notice to produce it at the hearing was given to the respondent purportedly under s 66 of the Evidence Act 1950. PW8 deposed on the selling price of each type of building to be constructed which totalled up to RM10,820,000 (see rekod rayuan tambahan encl 1D at p 27) and he was not challenged on this. Secondly, PW7 the quantity surveyor for the project testified that the estimated construction cost was RM4.7m supported by the figure of RM4,768,500 as stated in exh P6 (see rekod rayuan tambahan encl 1D at p 19 and rekod rayuan encl 1A at p 244) and he too was not challenged on this. PW8 confirmed that figure as the construction cost (see rekod rayuan tambahan at p 27). Therefore, the profit that was lost is RM3,854,100 as reflected in the statement of proof of loss of profits prepared by the appellants' solicitors and submitted to us at the hearing to which the respondent's counsel agreed as to the correctness of the particulars in the statement vis-a-vis the evidence. And lastly, the projected nett profit from the project is stated in exh P8 as RM3,401,820. As this figure was given in the letter accompanied by the FSR, the reliability of which, as we have stated earlier, was not doubted by the respondent, the question of whether the projected profit was reasonable or not as raised by the learned judge is a non-issue. Although the statement provides the loss of profit at RM3,854,100, it appears to us that in this appeal, the appellants are only pursuing on the figure of RM3,401,820 on the claim for loss of profit. Therefore, we are satisfied on the balance of probabilities that the loss of profit is that figure.

However, we are of the view that the appellants failed to mitigate their losses after the breach had occurred on 20 June 1987. We compute that date as the date of the breach because in the letter dated 11 June 1987 (exh P12), the appellants gave the respondent eight days notice to comply with their demand to release the charges. That being the case, the sale and purchase agreements entered into between the appellants and PW1, PW2 and PW4 separately on 29 May 1983, 16 June 1987 and 20 June 1987 respectively cannot be considered as sufficient mitigating factors because those transactions were made before the breach occurred and not really made as the result of the breach but made during the appellants' earlier effort to raise the extra RM400,000 as part of the bridging finance for Phase 3. The appellants did not make any attempt to raise the required fund from other

sources despite the fact that the property was valued at RM4m and PW8 was having custody of the titles to the six lots and in physical possession of those lots. Furthermore, during the period of about five years between the date of the breach and the actual discharge of the charges PW8 could have instructed his solicitors to initiate the discharge of the charges as the titles were in his custody and yet he did not do so which rendered Phase 3 a non-starter. By reason of the failure to mitigate the losses, it is our considered view that the appellants are only entitled to 50% of the loss of profit as claimed, having regard to the fact that the development of Phase 3 could not be proceeded with at all by the respondent's breach which resulted in the inability of the appellants to raise only a small portion, that is to say, about 28% of the total amount of bridging finance required for the Phase.

Therefore, we allow the appeal with costs here and in the court below and set aside the order of the learned judge and as a substitute, judgment is hereby entered against the respondent in the sum of RM1,700,910 as damages for loss of profit, with the interest at 8%pa from the date hereof until realization. The deposits paid into court by the appellants are to be refunded.

My learned brothers Denis Ong and Alauddin JJCA have read this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Lim Lee Na